89- 1433

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler were defendants in the district court and are appellees here.

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-18a) is not yet reported.

JURISDICTION

The district court issued an order (App., *infra*, 19a) dismissing the criminal informations on March 5, 1990. A notice of appeal to this Court (App., *infra*, 20a-21a) was filed on March 6, 1990. The jurisdiction of this Court is invoked under Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)), which provides:

> (d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court

ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from

any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), this Court held that a state statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. That decision raised concerns in the Executive and Legislative Branches over the vitality of an analogous federal provision, 18 U.S.C. 700(a) (1988).[1] As a result, Congress amended that statute with the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777. As amended effective October 28, 1989, Section 700(a)(1) makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See p. 2, *supra*.

On October 30, 1989, appellees participated in a demonstration outside the Capitol, in Washington, D.C., and burned several American flags. Appellees were each charged in separate criminal informations with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777. The district court

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[1] Former Section 700(a) made criminally liable:

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *.

granted a joint motion to dismiss the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment.

A. *Texas* v. *Johnson*

The defendant in *Texas* v. *Johnson*, *supra*, burned an American flag during a political demonstration in Dallas. He was convicted in Texas state court of desecrating a venerated object, a misdemeanor offense in violation of Tex. Penal Code § 42.09(a)(3) (1989). Under that provision, an individual "commit[ted] an offense if he intentionally or knowingly desecrates * * * a state or national flag," *ibid.*; the statute defined "desecrate" to "mean[] deface, damage, or otherwise physically mistreat in any way that the actor knows will seriously offend one or more persons likely to observe or discover his action," *id.* § 42.09(b). Johnson contended before the Texas state appellate courts that the First Amendment prohibited his criminal conviction for flag burning. The Texas Court of Criminal Appeals agreed. See *Texas* v. *Johnson*, 109 S. Ct. at 2536-2537.

On June 21, 1989, this Court affirmed that ruling by a sharply divided vote, holding that the Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. *Texas* v. *Johnson*, 109 S. Ct. at 2536-2548 (Brennan, J., joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.); *id.* at 2548 (Kennedy, J., concurring); *id.* at 2548-2555 (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting); *id.* at 2555-2557 (Stevens, J., dissenting).

At the outset, the Court outlined the pertinent analysis:

> We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien*, [391 U.S 367, 377 (1968)], for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

109 S. Ct. at 2538 (citations omitted). The Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment," *id.* at 2540 (internal quotation marks and citation omitted); the Court thus turned to consider the interests advanced by the State of Texas to support its prohibition against flag burning.

The State first asserted an interest in preventing breaches of the peace. The Court found, however, that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning," 109 S. Ct. at 2541, and thus concluded that the "State's position * * * amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace * * *," *ibid.* The Court rejected that sort of categorical presumption and held that, on the record presented, "the State's interest in maintaining order is not implicated." *Id.* at 2542.

Turning to the State's other asserted interest, "preserving the flag as a symbol of nationhood and national unity," 109 S. Ct. at 2542, the Court first concluded that that interest "is related to expression in the case of Johnson's burning of the flag," *ibid.* (citing *Spence* v. *Washington*, 418 U.S. 405 (1974)). The Court noted that the State appeared to be concerned "that such conduct will lead people to believe * * * that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts * * *." 109 S. Ct. at 2542. Since those "concerns blossom only when a person's treatment of the flag communicates some message," the Court determined that the State's interest was related "to the suppression of free expression." *Ibid.* And the Court specifically found that Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Id.* at 2543. Consequently, the less stringent standard of *O'Brien* was inapplicable. Instead, the Court subjected the State's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" 109 S. Ct. at 2543 (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988)).[2]

The Court concluded that that interest could not overcome "a bedrock principle underlying the First Amendment," namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. The Court rejected the proposition

[2] The Court noted that the record contained no suggestion that the defendant had stolen the flag he burned. As a result, the Court made clear that "nothing in [its] opinion should be taken to suggest that one is free to steal a flag so long as one uses it to communicate an idea." *Texas* v. *Johnson*, 109 S. Ct. at 2544 n.8.

that "a State may foster its own view of the flag by prohibiting expressive conduct related to it," *id.* at 2545, stating that it has "never before * * * held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents," *id.* at 2546. And the Court refused to accord the flag any special constitutional protection, finding that there is "no indication—either in the text of the Constitution or in our cases interpreting it—that a special juridical category exists for the American flag alone." *Ibid.*

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented. 109 S. Ct. at 2548-2555. "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way * * * Johnson did here." *Id.* at 2548. The Chief Justice pointed out that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 2552. Accordingly, he could not agree that "the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag." *Ibid.*

Analogizing Johnson's flag burning to the "fighting words" denied First Amendment protection in decisions such as *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the Chief Justice stated that "it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace," 109 S. Ct. at 2553. And he emphasized that the Texas statute "deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a

full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." In other words, "in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey." *Id.* at 2554.

Justice Stevens also dissented. 109 S. Ct. at 2555-2557. Given the "unique value" of the flag as a national symbol, Justice Stevens concluded that the government's interest in preserving that symbol certainly "supports a prohibition on the desecration of the American flag." *Id.* at 2557.

B. The Flag Protection Act of 1989

1. The Court's decision in *Texas* v. *Johnson*, *supra*, immediately raised concerns in the Executive and Legislative Branches over the vitality of 18 U.S.C. 700(a) (1988), the federal prohibition against desecration of the American flag. See note 1, *supra*. In *Johnson*'s wake, Congress moved with considerable dispatch to protect the integrity of the American flag. See, *e.g.*, 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (statement of Sen. Biden). By mid-July 1989, a number of different proposals either to amend the federal statute or amend the Constitution had been introduced in both the Senate and the House of Representatives. See, *e.g.*, S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2-3 (1989).

During the summer of 1989, the Judiciary Committees of both the House and Senate held extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. See *Statutory and Constitutional Responses to the Supreme Court Decision in* Texas *v.* Johnson: *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*Senate Hearings*]. Committee members heard widely divergent testimony from a variety of sources, including Members of Congress, concerned citizens, representatives of veterans' organizations, constitutional law scholars, prominent jurists and attorneys, and representatives from the Department of Justice.[3] As a result of these hearings, each Committee reported out a bill to amend the current federal statute in light of *Texas* v. *Johnson*. The Committees chose not to propose constitutional amendments to overturn that decision.

2. The Senate bill, S. 1338, 101st Cong., 1st Sess. (1989), would have amended 18 U.S.C. 700(a) by deleting the element of "casts contempt upon" the flag, and instead would have made criminally liable "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States * * *." S. Rep. No. 152, *supra*, at 16. The Committee Report explained that the Senate bill's purpose

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[3] William Barr, Assistant Attorney General, Office of Legal Counsel, presented testimony on behalf of the Department of Justice. He explained the Department's position at length before both the House and Senate Judiciary Committees "that, in light of the expansive decision of the Court [in *Texas* v. *Johnson*], a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment." *House Hearings* 173; *Senate Hearings* 71; see *House Hearings* 166-199; *Senate Hearings* 64-99, 115-117. Attorney General Thornburgh reiterated that position in a letter submitted to the Senate Judiciary Committee. See *Senate Hearings* 118-119.

> is to protect the physical integrity of the American flag * * *. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. * * *
>
> * * * *
>
> The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 2-3.

Furthermore, the report reflected the Committee's concerted effort to draft a bill consistent with the holding in *Texas* v. *Johnson*:

> [U]nlike the law struck down in *Texas* v. *Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas* v. *Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas* v. *Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, *supra*, at 10. The Committee recognized that its bill would face a constitutional challenge, but after weighing all the competing arguments, ultimately concluded that the bill "would pass constitutional muster." S. Rep. No. 152, *supra*, at 15.

The House bill, H.R. 2978, 101st Cong., 1st Sess. (1989)—which, with minor changes, became the Flag Protection Act of 1989—expanded on the proposed Senate bill by including a new definition of "flag of the United States," an exception for disposing of a worn or soiled flag, and a provision for expedited judicial review. See H.R. Rep. No. 231, *supra*, at 1-2, 13-14; pp. 2-3, *supra*.[4] The Committee Report explained that the bill's purpose "is to protect the physical integrity of American flags." H.R. Rep. No. 231, *supra*, at 2.[5] The Committee Report made clear that the bill, like its counterpart in the Senate, was carefully considered and drafted in light of *Texas* v. *Johnson*:

> The bill responds to [that] decision * * * by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, *supra*, at 2.

The Committee was aware that the bill would likely face constitutional challenges, and thus sought to minimize "the delay and uncertainty that might result from extended litigation to determine the con-

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[4] Unlike its Senate counterpart, the House bill originally limited proscribed acts to "mutilates, defaces, burns, or tramples." See H.R. Rep. No. 231, *supra*, at 13. The House later accepted the Senate amendments and expanded the list of proscribed acts to include "physically defile[]" and "maintain[] on the floor or ground." See note 6, *infra*.

[5] For that reason, the bill included an exception for disposal of a worn or soiled flag. As the Committee Report explained, "[w]hen a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies." H.R. Rep. No. 231, *supra*, at 9. The bill also narrowed the definition of a "flag of the United States" to avoid "infirmities of vagueness or overbreadth." H.R. Rep. No. 231, *supra*, at 12.

stitutionality of the statute." H.R. Rep. No. 231, *supra*, at 10. Accordingly, the bill included an express provision for expedited review "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the Committee explained, "[e]xpedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

3. On September 12, 1989, after a floor debate, the House of Representatives overwhelmingly passed H.R. 2978, as reported out of committee, by a vote of 380 to 38. See 135 Cong. Rec. H5500-H5514, H5562 (daily ed. Sept. 12, 1989). As a result, the Senate proceeded to consider that bill, as opposed to S. 1338. See 135 Cong. Rec. S12,571 (daily ed. Oct. 4, 1989). And on October 5, the Senate, after adding two proscribed acts to the bill,[6] overwhelmingly passed H.R. 2978, by a vote of 91 to 9. See 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989). The amended bill was therefore returned to the House, where, on October 12, it was passed by a wide margin (371 to 43). See 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989). The President allowed the bill to become law without his signature on October 28, 1989.[7]

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[6] The Senate added to H.R. 2978, as passed by the House, the proscribed acts of "physically defile[]" and "maintain[] on the floor or ground." See 135 Cong. Rec. S12,616-S12,619 (daily ed. Oct. 4, 1989); *id.* at S12,654-S12,655 (daily ed. Oct. 5, 1989).

[7] In his formal statement to Congress, the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989). Nevertheless, he stated his "serious doubts that [the legislation] can withstand Supreme Court review," and made clear his position "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." *Ibid.*

Despite the Executive Branch's stated position that a constitutional amendment was necessary to ensure that the flag would be protected in the wake of *Texas* v. *Johnson* (see note 3, *supra*), Congress chose to enact the statute. As the Court noted in *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981), "[t]he Congress is a coequal branch of government whose Members take the same oath we do to upheld the Constitution of the United States. * * * The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. And it is our position in this Court that the Court should affirm the constitutionality of the Flag Protection Act because of Congress's determination regarding the weight of the governmental interest at stake and because the proscribed conduct should not fall within the protection of the First Amendment.

[8] Since the district court granted appellees' pretrial motion to dismiss the flag-burning charges, the pertinent facts are not disputed. See App., *infra*, 2a.

C. Criminal Charges

1. On October 30, 1989, appellees, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler, participated in a demonstration outside the Capitol, in Washington, D.C.[8] That demonstration, occurring shortly after the Flag Protection Act of 1989 became effective, was hailed as a "CHALLENG[E]" to that statute. Attachment B, at 1, to U.S. Mem. in Opposition to Defendants' Mot. to Dismiss, *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. filed Jan. 12, 1990). As stated in a leaflet distributed at the rally:

> The battle lines are drawn. On one side stands the government and all those in favor of compulsory patriotism and enforced rever[e]nce to the flag. On the other side are all those[] opposed to this. And to all the oppressed we have this to say also. This flag means one thing to the powers that be and something else to all of us. Ever[y]thing bad this system has done and continues to do to people all over this world has been done under this flag. No law, no amendment will change it, cover it up, or stiffle [*sic*] that truth. So to you we say, Express yourself! Burn this flag. It's quick, it's easy, it may not be the law, but it's the right thing to do.

Attachment B, *supra*, at 2; see App., *infra* 2a & n.1. During that demonstration, appellees each set an American flag on fire; those flags were incinerated. App., *infra*, 2a-3a; see Declaration of Edward L. Bailor (Jan. 1, 1990), attached to U.S. Mem. in Opposition to Defendant's Mot. to Dismiss, *supra*.

2. On October 31, 1989, the United States Attorney for the District of Columbia filed separate criminal informations charging each appellee with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989.[9]

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[9] Gregory Johnson, whose state criminal conviction culminated in *Texas* v. *Johnson*, had also participated in the demonstration at the Capitol. Johnson tried to burn an American flag, but that attempt was foiled when a police officer grabbed the flag out of Johnson's hands before he could set it ablaze. As a result, the United States Attorney declined to charge Johnson with violating the Flag Protection Act. See App., *infra*, 2a-3a & n.4; U.S. Mem. in Opposition to Defendants' Mot. to Dismiss at 2 n.3, *United States* v. *Eichman*, Cr. Nos. 89-419, 89-420, 89-421 (D.D.C. filed Jan. 12, 1990).

On December 5, 1989, appellees filed a joint motion to dismiss the criminal informations. Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of review mandated by *Texas* v. *Johnson*, and therefore violated the First Amendment.[10]

D. The District Court Decision

On March 5, 1990, the district court granted the motion to dismiss the informations, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment. App., *infra*, 1a-18a.[11] As a threshold matter, the court concluded that appellees' "flag-burning constitutes expressive conduct of an overtly political nature and thus, implicates the First Amendment." App., *infra*, 10a.

Turning to the applicable standard of review, the district court determined that, under *Texas* v. *Johnson*, courts must apply strict scrutiny. Here, like the State's purpose in outlawing flag desecration in *Texas* v. *Johnson*, the "underlying purpose [of the Flag Protection Act] is to preserve the flag's symbolic value." App., *infra*, 11a. The court therefore concluded that

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[10] The United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

[11] For that reason, the district court did not address appellees' claim that the statute was unconstitutional on its face. App., *infra*, 15a n.9.

The district court noted the recent decision in *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990), striking down the Flag Protection Act as unconstitutional. The court found that decision "persuasive" and thus "willingly adopt[ed] much of [its] analysis." App., *infra*, 8a. See notes 13, 14, *infra*.

the Act "relates to the suppression of expression and should be scrutinized rigorously." App., *infra*, 11a.[12]

The Senate, as amicus curiae, contended that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress was seeking "to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views." App., *infra*, 12a. The district court rejected that argument, explaining that

> [i]t makes no difference whether we describe [the flag] as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [*sic*] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message.

App., *infra*, 14a. In the court's view, the statute's "restriction, as applied to [appellees], is content-based and is subject to strict scrutiny." App., *infra*, 14a.

The House of Representatives, as amicus curiae, took a different approach, contending that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress sought "to protect the state's sovereign interest in the flag." App., *infra*, 14a. The district court, agreeing with the district court's analysis in *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990) (see notes 13, 14, *infra*), dismissed that argument on two grounds: first, "the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest," App., *infra*, 15a, and second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," App., *infra*, 15a (internal quotation marks and citation omitted).

[12] The United States agreed with appellees that, under *Texas* v. *Johnson*, the Flag Protection Act was subject to strict scrutiny, as opposed to the more lenient *O'Brien* standard of review. App., *infra*, 11a.

Applying the stringent standard of review to the Flag Protection Act, the district court concluded that "the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is [not] sufficiently compelling to justify convicting [appellees] for burning United States flags." App., *infra*, 15a. The court observed that in *Texas* v. *Johnson*, this Court stated that the government may not "foster its own views of the flag by prohibiting expressive conduct relating to it," App., *infra*, 16a (quoting *Texas* v. *Johnson*, 109 S. Ct. at 2545). And the court decided that *Texas* v. *Johnson* foreclosed the government's claim that Congress, on behalf of the Nation, has "a sufficiently compelling interest [in preserving the flag as a national symbol] to survive strict scrutiny." App., *infra*, 16a.

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), a sharply divided Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. In so holding, the Court stressed one infirmity of that state law provision—the law "reache[d] only those severe acts of physical

abuse of the flag carried out in a way likely to be offensive," *id.* at 2543, and emphasized the narrowness of the question it was deciding. See *id.* at 2544 n.8 ("Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted.") By contrast, this case involves a federal statute—based on Congress's determination that the American flag is a unique national symbol deserving special protection—that prohibits persons from physically destroying that symbol, without reference to immediate audience reaction. In these respects, the case presents a question not squarely controlled by *Texas* v. *Johnson*. The question, which involves the constitutionality of a carefully drafted federal statute enacted by overwhelming votes of Congress, is substantial and should be set for plenary consideration by this Court.

1. The substantial nature of the constitutional question presented is made plain by Congress's express provision for expedited direct review in this Court. Flag Protection Act of 1989, Pub. L. No. 101-131, § 3, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)); pp. 2-3, *supra*. Section 700(d)(1), as amended, specifically provides that

> [a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree or order issued by a United States district court ruling upon the constitutionality of [Section 700](a).

Congress further stressed the significance of resolving the statute's constitutionality by providing for *mandatory, expedited* appellate review in this Court over a ruling on that issue appealed to the Court:

> The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

18 U.S.C. 700(d)(2) (as amended).

Congress was well aware that the Flag Protection Act would likely be challenged, and thus sought to minimize "the delay and uncertainty that might result from extended litigation * * *." H.R. Rep. No. 231, *supra*, at 10. Congress thus included these special jurisdictional provisions "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10. As the House Judiciary Committee explained, "[e]xpedited review insures not only that any question regarding the law's constitutionality is resolved quickly, but also that such review is conducted definitively by the Supreme Court." H.R. Rep. No. 231, *supra*, at 11.

In this case, a constitutional challenge to the Flag Protection Act, the district court has struck down that statute as unconstitutional as applied to appellees' burning of a flag of the United States.[13] The Court "has not previously ruled on [that] question," 18 U.S.C. 700(d)(2) (as amended), and thus this case falls squarely within the Court's mandatory appellate jurisdiction created by the Flag Protection Act and merits the expedited review expressly provided by that statute.

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[13] On February 21, 1990, the United States District Court for the Western District of Washington held that the Flag Protection Act, as applied to a prosecution for burning an American flag, violated the First Amendment. *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990). The United States filed a notice of appeal to this Court on February 23, 1990. The United States is today filing its jurisdictional statement in that case, requesting that the Court consider both cases simultaneously.

2. The United States does not dispute that appellees' flag burning constitutes expressive conduct. See, *e.g.*, *Texas* v. *Johnson*, 109 S. Ct. at 2539-2540; *Spence* v. *Washington*, 418 U.S. 405, 409-410 (1974). Nor does the United States dispute that Congress enacted the Flag Protection Act in order to prohibit that narrow category of "symbolic speech"—that is precisely the purpose of this criminal provision. See App., *infra*, 10a-14a; pp. 8-12, *supra*. Nevertheless, those propositions should not doom the Act's constitutionality. In this case, the district court overvalued, for purposes of the First Amendment, the narrow category of expressive conduct at stake, and undervalued the compelling governmental interest—expressly identified by both the Congress and the President—that lies at the core of the statute: the preservation of the flag as the unique symbol of our Nation. When reviewed from the proper constitutional perspective, the Flag Protection Act fits within the bounds of the First Amendment.[14]

a. In a line of established precedent, the Court has "laid the foundation for the excision of [certain speech] from the realm of constitutionally protected expression." *New York* v. *Ferber*, 458 U.S. 747, 754 (1982). As summarized by the Court over a generation ago:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include

[14] As noted (see note 13, *supra*), the United States is today filing its jurisdictional statement in *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990), and is requesting that the Court consider both cases simultaneously. *Haggerty*, unlike the instant case, involves a prosecution for burning an American flag that was federal property.

> the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. *New Hampshire*, 315 U.S. 568, 571-572 (1942) (footnotes omitted); see, *e.g.*, *New York* v. *Ferber*, *supra* (child pornography); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Roth* v. *United States*, 354 U.S. 476 (1957) (obscenity). Those categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. at 572. In other words,

> it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

New York v. *Ferber*, 458 U.S. at 763-764; see *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

The Court has consistently recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California*, 413 U.S. 15, 23 (1973). Nevertheless, as an acknowledgment of shared values that are part of the Nation's heritage, the Court has refused to accord certain narrow, well-defined types of speech full First Amendment protection. As *Chaplinsky* and *Ferber* suggest, the protections of the First Amendment do not apply where

(1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or for particular overarching social policies, see, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) (false and misleading commercial speech); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) (employer's anti-union statements before representation election), and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message, cf. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (restrictions on exhibition of "adult films").[15]

b. That constraining principle of the First Amendment applies to the conduct at issue—appellees' burning of a flag of the United States. Congress, which by design takes into account the interests of all citizens, see The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961), and the President, who is "elected by all the people," *Myers* v. *United States*, 272 U.S. 52, 123 (1926), have now spoken with one voice—the physical integrity of the flag of the United States,

[15] To be sure, in both *Texas* v. *Johnson*, 109 S. Ct. at 2546 n.11, and *Spence* v. *Washington*, 418 U.S. at 411 n.4, the Court eschewed such a consideration of alternative means of expression, in the context of holding that the First Amendment protected symbolic speech involving the American flag. Those decisions, however, assumed that such expressive conduct merited full First Amendment protection. This case presents the Court with the opportunity to reconsider that premise, particularly where, as here, the people's elected representatives—the Congress and the President—have made the considered decision that the physical destruction of the flag is—uniquely—anathema to the Nation's values.

as the unique symbol of the Nation, merits protection not accorded other national emblems.

As the Senate Judiciary Committee explained:

> The flag has stood as the unique and unalloyed symobl of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3. The House Judiciary Committee echoed those findings:

> [The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object * * *.

H.R. Rep. No. 231, *supra*, at 9. And the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989).

In *Spence* v. *Washington*, 418 U.S. at 413, the Court eloquently foreshadowed the motivating force behind the Flag Protection Act:

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

And that representative consensus identifies the substantial potential harm posed by wanton physical

destruction of the American flag—the weakening of the shared values that bind our national community."[13] As Justice Stevens remarked:

> [S]anctioning the public desecration of the flag will tarnish its value—both to those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.

Texas v. *Johnson*, 109 S. Ct. at 2556 (dissenting opinion).

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like "fighting words," obscene materials, and defamatory statements,[17] presents substantial "evils" incompatible with "the very purpose for which organized governments are instituted," *Texas* v. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). And, such conduct (at most) involves "expressive interests" which, given the availability of other means of

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[16] Indeed, Congress originally enacted the predecessor statute in 1968 based on its finding that "[p]ublic burning, destruction, and dishonor of the national emblem inflicts an injury on the entire Nation." S. Rep. No. 1287, 90th Cong., 1st Sess. [*sic*; 2d] 3 (1968).

[17] Such statements fit literally within the text of the First Amendment, yet they have been deemed unworthy of protection and thus not to constitute "speech" for purposes of First Amendment analysis. That is so even though such expressions may reflect the most deeply held views on subjects of interest to the polity (and thus lying at the core of those values protected by the First Amendment).

expression, are "overwhelmingly outweigh[ed]" by the identified harm. *New York* v. *Ferber*, 458 U.S. at 763-764. Considered within this analytical framework, the Flag Protection Act, contrary to the district court's reasoning, is consistent with the First Amendment.

c. Although the act of burning an American flag, in our view, falls outside the scope of protected speech under the First Amendment, a governmental prohibition against such conduct must still withstand judicial scrutiny. As both this case, see App., *infra*, 2a-3a, and *Texas* v. *Johnson*, 109 S. Ct. at 2536-2540, vividly show, the proscribed conduct will likely be accompanied by otherwise fully protected expression. For that reason, a governmental measure designed to outlaw destruction of an American flag must be limited to achieve that particular objective and should be scrutinized to ensure that it does not unnecessarily proscribe otherwise protected expression under the First Amendment. See, *e.g.*, *Street* v. *New York*, 394 U.S. 576 (1969). The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—ensures that only such unprotected expression will be prosecuted.

d. Finally, we recognize that our submission here is in tension with the Court's recent decision in *Texas* v. *Johnson*, *supra*. Nevertheless, the Court there had no occasion to address, much less weigh for constitutional purposes, the sort of express *Congressional* determination regarding the need to protect the integrity of the American flag that led to the enactment of the Flag Protection Act at issue in this case. And to the extent that the *Johnson* Court accorded flag

burning, as expressive conduct, full First Amendment protections, the United States respectfully suggests that this case—together with *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990) (see notes 13, 14, *supra*)—present an appropriate occasion for the Court to consider more fully that analysis.

3. As noted, the Flag Protection Act specifies that an appeal to this Court may be taken "from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality" of the Act, 18 U.S.C. 700(d)(1) (as amended), and that "[t]he Supreme Court shall * * * accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible," 18 U.S.C. 700(d)(2) (as amended). In view of those express Congressional directives, the United States has endeavored to expedite the matter thus far, and we stand ready to adhere to an expedited briefing schedule. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).[18]

[18] In *Dames & Moore*, the Court granted certiorari before judgment on June 11, 1981, and ordered the parties to exchange and file opening briefs by June 19, 1981, and any reply briefs by June 23, 1981. The case was argued on June 24, 1981, and decided by July 2, 1981. This occurred in a case in which Congress had not even mandated expedited review, let alone expedited review "to the greatest extent possible."

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited, simultaneously with the appeal filed in *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash. Feb. 21, 1990).

Respectfully submitted.

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MARCH 1990

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
SCOTT W. TYLER

[Filed: Mar. 5, 1990]

OPINION

This matter is before the Court on the defendants' Motion to Dismiss the informations filed against Shawn D. Eichman, David Blalock and Scott W. Tyler based on the alleged unconstitutionality of the Flag Protection Act of 1989 under which the defendants were charged. Upon consideration of the defendants' motion, the government's opposition, memoranda filed by the United States Senate and the Speaker and Leadership Group of the House as *amici curiae* opposing the defendants' motion, evidence presented at the February 22, 1990 hearing on the motion, and for the reasons set forth below, the Court finds the Flag Protection Act of 1989 to be unconstitutional and, therefore, grants the defendants' motion to dismiss.

I. Facts

A. Defendants' Actions

Although the defendants refused to enter a stipulated statement of facts with the government, the facts of this matter are largely undisputed. Shortly before noon on October 30, 1989, defendants Shawn Eichman, David Blalock and Scott Tyler set ablaze several United States Flags on the east steps of the United States Capitol during a political demonstration. The defendants, together with one Gregory Lee Johnson, were protesting various aspects of United States domestic and foreign policy.[1] But they were

[1] Defendants' companions present during the flag burning distributed and read aloud a two-page statement to the small crowd of media representatives and onlookers which gathered on the Capitol steps. *See* Government's Memorandum in Opposition to Defendants' Motion to Dismiss ("Government's Opposition"), Attachment B. The statement, signed by the defendants, challenged the government to test the constitutionality of the Flag Protection Act by arresting the defendants. It also decried "compulsory patriotism and enforced reverence to the flag." It listed "increasing racism, assaults on women['s] rights, calls for an enforced, oppressive moral code, censorship, intervention in other countries and overall escalating attacks on the people" as some of the varied reasons the defendants promoted flag burning.

As addenda to their motion to dismiss, the defendants have submitted sworn declarations in which they offer *post facto* explanations for burning the flag. *See* Defendants' Motion to Dismiss ("Defendants' Motion") Exhibits 2-4. Shawn Eichman burned the flag to protest the United States' oppression of women and intervention abroad. Defendants' Motion, Exhibit 4. David Blalock, a Vietnam veteran, burned the flag in opposition to American intervention abroad. Defendants' Motion, Exhibit 2. Scott Tyler, in burning the flag, expressed his solidarity with all people oppressed by the United States. He also burned the flag in protest of the clause in the Act making

united in their objection to the newly enacted Flag Protection Act of 1989.[2]

The defendants and Mr. Johnson were arrested for violating the Flag Protection Act of 1989, disorderly conduct and demonstrating without a permit.[3] The United States Attorney for the District of Columbia later charged the three defendants with violation of the Act. Mr. Johnson, whose flag did not ignite, was not charged.[4]

B. The Flag Protection Act of 1989

The Flag Protection Act of 1989 (hereinafter "Act" or "Flag Protection Act") amends 18 U.S.C. Section 700. The Act provides that "(w)hoever

it a crime to "maintain (the flag) on the floor or ground", which he claims the Congress added in response to his controversial art exhibit, "What is the Proper Way to Display the U.S. Flag?", displayed by the School of Art Institute of Chicago in February 1989. Defendants' Motion, Exhibit 3. Gregory Lee Johnson also submitted a statement explaining that his attempt to burn the flag expressed his unity with oppressed people throughout the world. Defendants' Motion, Exhibit 5.

[2] The Flag Protection Act of 1989, Pub. L. No. 101-131, 1989 U.S. Code Cong. and Admin. News (103 Stat.) 777 (to be codified at 18 U.S.C. Section 700).

[3] Corporation Counsel for the District of Columbia declined to prosecute any of the four individuals arrested for disorderly conduct, 22 D.C. Code Section 1121, or demonstrating without a permit, Section 153 of the Traffic and Motor Vehicle Regulations for the United States Capital [*sic*] Grounds.

[4] Although the defendants have suggested that the government refused to charge Mr. Johnson for strategic reasons, the United States explained both in its papers and in oral argument that it could not prosecute Mr. Johnson without sufficient evidence that he, in fact, had violated the Act.

knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." Section 2(a)(1), [amending 18 U.S.C. Section 700(a)(1)]. However, the Act "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." Section 2(a)(2), [amending 18 U.S.C. Section 700(a)(2)]. The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." Section 2(b), [amending 18 U.S.C. Section 700(b)].

C. *Texas v. Johnson*

Legislative history reveals that the Flag Protection Act was a congressional response to the Supreme Court's recent opinion in *Texas v. Johnson*, 491 U.S. ——, 105 L.Ed.2d 342, 109 S.Ct. 2533 (1989). H.R. Rep. No. 101-123, 101st Cong., 1st Sess. 2 (1989); S. Rep. No. 101-152, 101st Cong., 1st Sess. 4 (1989). *See generally, Hearings on Measures to Protect the Physical Integrity of the American Flag*, Hearings Before the Comm. on the Judiciary, United States Senate, 101st Cong., 1st Sess. 1-754; *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson*, Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives, 101st Cong., 1st Sess. 1-572 (1989). In *Johnson*, the United States Supreme Court overturned the conviction of Gregory Lee Johnson [5] under a Texas statute

[5] This is the same Gregory Lee Johnson whom the government declined to charge in the present matter.

which prohibited the desecration of venerated objects, including the United States Flag. The statute under which Mr. Johnson was charged made it a crime in Texas to "deface, damage or otherwise physically mistreat in a way the actor knows will seriously offend one or more persons likely to observe or discover his actions." *Johnson*, 109 S. Ct. at 2537, n.1. The winds of fortune blowing in the opposite direction, Mr. Johnson managed to ignite and burn a United States flag on the steps of City Hall in Dallas, Texas during the Republican National Convention. The flag-burning was the culmination of a demonstration against Reagan administration policies.

The Supreme Court declared the Texas statute unconstitutional as applied to Mr. Johnson. As a threshold matter, the Court determined that Mr. Johnson, in burning the United States flag, had engaged in expressive conduct protected by the First Amendment. Justice Brennan, writing for the majority, declared eloquently that the flag is "pregnant with expressive conduct". *Id.* at 2540. Mr. Johnson's decision to burn this potent symbol on the eve of Ronald Reagan's renomination, at the doorsteps of the city hosting the Republican Convention was, the Court concluded, "sufficiently imbued with the elements of communication," to implicate the First Amendment." *Johnson*, at 2540, *quoting Spence v. Washington*, 418 U.S. 405, 409 (1974).

The Court next considered what standard to apply in scrutinizing Texas' prohibition of this protected conduct. The Court held that if the interests advanced by Texas were related to the suppression of expression, then the more lenient test of expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) would not apply. Rather than establishing only an important or substantial government

interest in regulating the nonexpressive element of the conduct under the *O'Brien* test, the state would have to show a compelling interest to justify the regulation.

The Court found that Texas' asserted interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the flag actually caused a breach of the peace. *Johnson*, 109 S.Ct. at 2542. However, the Court held that the state's asserted interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression. *Id.* Relying on its prior holding in *Spence*, the Court concluded that a state interest in preserving the flag's symbolic value "blossom(ed) only when a person's treatment of the flag communicates some message", regardless of whether the conduct prohibited was affixing a peace symbol to the flag or flag-burning. *Id.*

Finally, the Court held that Texas' interest in preserving the symbolic value of the flag was not sufficiently compelling to justify the conviction of the defendant. *Id.* at 2542-2548. In attempting to prohibit only those flag-burnings which caused serious offense, the Court found Texas had violated "a bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. The Court rejected Texas' attempt to "foster its own view of the flag by prohibiting expressive conduct relating to it." *Id.* at 2545. For, as the Court stated, to allow flag-burning only when it does not endanger the flag's symbolic role, would be to permit the Government to "prescribe what shall be orthodox" in violation of the First Amendment. *Id.* at 2546. The Court also refused to accord the flag any special constitutional significance, finding "no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American Flag alone." *Id.*

II. Discussion

The defendants assert that *Johnson* controls the disposition of this case and that the same result must follow here. They also challenge the constitutionality of the Act on its face, claiming that it is impermissibly viewpoint-based, vague and overbroad. They argue that each of these ground requires dismissal of the charges against them.

In oral argument, the defendants have pointed the Court to *United States v. Haggerty*, Criminal No. 89-315R (W.D.W. February 21, 1989 [*sic*; 1990]) decided recently by the United States District Court for the Western District of Washington at Seattle, in support of their position. In *Haggerty*, Judge Rothstein held that the defendants, who burned a United States flag in front of a Seattle post office only minutes after the Flag Protection Act of 1989 took effect, could not be prosecuted for flag-burning because the Act violates the First Amendment. Judge Rothstein concluded that under the *Johnson* analysis, the government's asserted interest in enacting the Flag Protection Act, namely, to protect the symbolic value of the flag, "cannot survive the exacting scrutiny which [the] Court must apply." *Haggerty*, Criminal No. 89-315R, slip op. at 12.

The defendants urge this Court to follow *Haggerty*'s lead and strike down the Act. Of the litigants opposing the defendants' motion,[6] only the Senate has

[6] Like the *Haggerty* court, this Court has received memoranda in opposition to the defendants' motion to dismiss from

commented on the *Haggerty* opinion. At the hearing on the defendants' motion to dismiss, Senate counsel expressed concern over what she termed mischaracterizations of the Senate's argument, mischaracterizations which she felt were crucial to the Court's decision. Counsel for the Senate argued that *Haggerty* misconstrued *Johnson* in holding that the flag could never be protected because the governmental interest in flag protection would be related necessarily to the suppression of expression.

The Court finds Judge Rothstein's reasoning eloquent and persuasive and willingly adopts much of her analysis. In proceeding with its own analysis, the Court seeks primarily to add weight the logic of the argument and to address concerns voiced by the Senate at the hearing on the motion to dismiss.

A. Defendants' Flag-burning Constitutes Expressive Conduct Under the First Amendment

The First Amendment of the United States Constitution protects against the infringement of speech by the Government. The protection is not limited to the written or spoken word. A person also may express his thoughts through conduct in which he purposefully engages. The Supreme Court has recognized that such symbolic speech or expressive conduct lies within the confines of the First Amendment's protection of free speech. *See, e.g., Brown v. Louisiana,* 383

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three sources. The Department of Justice, as prosecutor, speaks for the executive branch, and their position mirrors the congressional testimony of William P. Barr, Assistant Attorney General for the Office of Legal Counsel. The Speaker and Leadership Group (consisting of the Majority Leader and the Majority Whip) of the House of Representatives and the Senate appear as amici curiae.

U.S. 131 (1966) (silent sit-in by blacks demonstrating against a segregated library); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969) (students wearing armbands to protect American military involvement in Vietnam); *Schacht v. United States,* 398 U.S. 58 (1970) (the wearing of United States military uniforms during a dramatic performance to criticize American intervention in Vietnam).

Moreover, the Court has determined that the American flag is "pregnant with expressive conduct", and many activities relating to it are shielded by the First Amendment. *Johnson,* 109 S.Ct. at 2540. *See e.g., Spence,* 418 U.S. at 409-410 (affixing a peace symbol to the flag); *Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943) (refusal to salute the flag); *Stromberg v. California,* 283 U.S. 359 (1931) (displaying a red flag). *See also, Smith v. Gougen,* 415 U.S. 566 (1974) (White, J., concurring in judgment) (wearing flag patch on seat of trousers is expressive speech). Most significant to the present case, of course, is the Supreme Court's determination in *Johnson* that flag-burning is within the ambit of First Amendment protection.

Nevertheless, the Court cannot assume axiomatically that a particular defendant's conduct is "sufficiently imbued with the elements of communication to fall within the scope of the First . . . Amendment[]", *Spence,* 418 U.S. at 409, even where the defendant engages in flag-burning. A person may burn a flag because he is cold or because he wishes to dispose of it, without intending thereby to convey an idea or opinion. The Court must examine whether the context of the defendants' actions "reveal an intent to convey a particularized message," and a "likelihood

. . . that the message [will] be understood by those who view[] it." *Id.* at 411.

The Court finds that defendants Eichman, Blalock and Tyler intended to communicate messages of dissent and succeeded dramatically in their attempt. The defendants burned the flags in challenge of the Flag Protection Act which had taken effect only two days earlier. They came from their homes in other states to carry out their challenge at the doors of the United States Congress which had enacted the statute. While the flags burned, companions passed out leaflets expressing the defendants' objections to the new law and other policies of the Federal Government. Given these circumstances, this Court, like the *Johnson* and *Haggerty* Courts, concludes that the defendants' flag-burning constitutes expressive conduct of an overtly political nature and thus, implicates the First Amendment.

B. Governmental Interest in the Flag Protection Act

Government restrictions on expressive conduct generally are not subject to the exacting scrutiny which restrictions on pure speech are subject to under the First Amendment. This is because expressive conduct contains both speech and non-speech elements. The Supreme Court held in *United States v. O'Brien* that the government need show only a sufficiently important interest in regulating non-speech elements of expressive conduct to justify incidental limitations on otherwise protected speech. *O'Brien*, 391 U.S. at 376.

However, the government cannot regulate the non-speech elements of expressive conduct where its true aim is to suppress the speech elements of the actor's

conduct. The Court, therefore, must focus on the government's interest in regulating expressive conduct to ferret out restrictions designed to suppress protected forms of expression. If the government's interest is related to the suppression of expression, then the more lenient standard of *O'Brien* does not apply. *Johnson*, 109 S.Ct. at 2542.

In *Johnson*, the Supreme Court applied strict scrutiny to the Texas statute because the state's asserted interest—preserving the flag as a symbol of nationhood and national unity—was related to the suppression of expression. *Johnson*, 109 S.Ct. at 2542-2543. A crucial question in this litigation is whether the government's asserted interest in enacting the Flag Protection Act is so similar to Texas' asserted interest in *Johnson*, that strict scrutiny also applies here.

The defendants argue that strict scrutiny does apply. The Department of Justice agrees. However, for separate reasons, the Senate and House both contend that the Court should employ the less rigorous balancing approach of *O'Brien*.

This Court concludes that any prosecution of the defendants[] under the Flag Protection Act should be reviewed with the strictest scrutiny. Even though the Act purports to protect the physical integrity of the flag, the Department of Justice, the Senate and the House all agree that its underlying purpose is to preserve the flag's symbolic value. Texas also sought to protect the flag as a symbol of the Nation. Thus, the Flag Protection Act, like the Texas anti-desecration statute, relates to the suppression of expression and should be scrutinized rigorously.

1. The United States Senate

The Senate attempts to distinguish *Johnson* by arguing that unlike Texas, the government is not

seeking to "foster its own view of the flag by prohibiting expressive conduct relating to it." *Johnson*, 109 S.Ct. at 2545. Rather, the government seeks to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views. According to the Senate, the government affirmatively seeks to protect the flag for everyone's use and no one's destruction. Record, at 44. *See also* Record, at 43 ("Congress has sought to regulate the manner in which everyone uses the flag so that the symbol remains undiluted as a means of communication for everyone.").

If the Senate's argument is that the government has "an interest simply in maintaining the flag as a symbol of *something*," then, "it [is] difficult to see how that interest is endangered by highly symbolic conduct such as [the defendants']." *Johnson*, 109 S.Ct. 2544. Thus, the Court would conclude that the government's interest is simply not implicated on these facts. *Id.* at 2538. However, the government's true purpose appears more restricted;[7] the government seeks to preserve the flag as a symbol only for

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[7] The Senate argues that the government pursues the following affirmative objectives in protecting the flag as a symbol:

> to assure that the symbolism of the flag will be of service to the preservation of the nation, as in times of war; to be sensitive to the emotions of families who receive the funeral flags of loved ones; to provide an overarching symbol under which a pluralistic society can strive to find common ground; to serve notice that anyone may speak his or her mind under the protection of the flag; and others.

Memorandum of the United States Senate as Amicus Curiae in Support of Constitutionality of the Flag Protection Act of 1989, at 33.

those who would not damage or destroy it. In doing so, the government impermissibly shuts out those viewpoints which are expressed through the symbolic destruction of the flag.

Nevertheless, the Senate asserts that the Act is content-neutral because it prohibits anyone from damaging the flag in specified ways regardless of the actor's intent to convey a message or the communicative impact of the conduct. Because the Act is content-neutral, the Senate contends, strict scrutiny does not apply.

A regulation is not content-neutral, however, merely because on the face of the statute the same rules apply to everyone. In some cases a statute may indicate clearly on its face that its application depends upon the content of the speaker's message. In others, the restriction appears facially neutral, yet, its purpose reveals an intent to suppress a particular viewpoint or range of viewpoints. The test of content-neutrality is whether the regulation is justified without reference to the content of the regulated speech. *Boos v. Barry*, 485 U.S. 312, 320 (1988)[8] Thus, as Judge Rothstein concludes in *Haggerty*, it is the reason for legislation, not its scope which determines content-neutrality. *Haggerty*, slip. op. at 10.

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[8] The Senate correctly points out that this conclusion was not supported by the majority of the Court in *Boos*. Justices Brennan and Marshall objected to the extension of the Court's "secondary effects analysis in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), to other types of speech, particularly political speech. *Boos*, 485 U.S. at 334-335 (Brennan, J., concurring in part and in the judgment). Chief Justice Rehnquist and Justices White and Blackmun dissented with the majority's conclusions on all First Amendment grounds. *Boos*, 485 U.S. at 338-339 (Rehnquist, C.J., concurring in part and

The reason Congress enacted the Flag Protection Act was to protect the flag as a symbol. It makes no difference whether we describe it as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [*sic*] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message. Therefore, the restriction, as applied to the defendants, is content-based and is subject to strict scrutiny.

2. United States House of Representatives

In addition to adopting the arguments of the Senate, the House advances a separate governmental interest in justification of the Flag Protection Act. The House claims that the government seeks to protect the state's sovereign interest in the flag. The House discusses at length case law and historical records illustrating the state's protection of the flag as an incident of sovereignty. The House argues that "[w]hile the *public* may generally look to the flag for

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dissenting in part). Justice Kennedy did not take part in considering or deciding the case.

However, the Court finds the Flag Protection Act is content-based even under the bright-line rule set forth by Justice Brennan. The application of the Flag Protection Act turns on whether the speaker seeks to show disrespect for the flag. If the speaker's message is "I do not support the flag, and all it commonly symbolizes," he is prevented from symbolically acting out that message. Supporters of the flag, however, are not prohibited from waving the flag, or flying it in any weather, or by other symbolic acts commonly employed to show the speaker's respect.

symbolizing values such as patriotism . . . the *government* has in the flag an incident of sovereignty, with definite concrete legal significance." Motion of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, at 3. This interest, the House maintains, is content-neutral, and therefore, strict scrutiny does not apply.

United States v. Haggerty points out the two central flaws in the House's argument. First, the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest, although it is replete with statements on the importance of protecting the flag as a symbol. *Haggerty*, slip. op. at 13. Second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," therefore, "that interest relates to the suppression of expression and is subject to strict scrutiny." *Id.*

C. Strict Scrutiny of the Government Interest

The Court turns now to the question of whether the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is sufficiently compelling to justify convicting the defendants for burning United States flags. The Court concludes that, under *Johnson*, it is not.[9]

The Supreme Court clearly held in *Johnson* that a governmental interest in protecting the flag as a

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[9] Because the Court has determined that the Flag Protection Act of 1989 is unconstitutional as applied to the defendants in this case, it need not consider the defendants' facial challenges of the Act.

symbol did not justify criminally punishing a person for burning a flag as a means of political protest. *Johnson*, 109 S.Ct. at 2547. This is not to say that the government cannot promote its interests in preserving the symbolic nature of the flag to its citizenry. The First Amendment presents no bar to gentle persuasion. But the government may not "foster its own views of the flag by prohibiting expressive conduct relating to it." *Johnson*, 109 S.Ct. at 2545.

The Department of Justice takes the position that the government's interest is sufficiently compelling to survive strict scrutiny. The Department of Justice recognizes that this Court has no authority to overrule *Johnson*. However, the Department of Justice suggests that the government's interests are more compelling than Texas' because both the Congres and the Executive have pronounced the protection of the flag as a necessary policy goal. The Department points to the Act itself and presidential support for a constitutional amendment as evidence of the compelling nature of the government's interest.

However compelling the government may see its interests, they cannot justify restrictions on speech which shake the very cornerstone of the First Amendment. As the Court stated in *Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive." The government seeks to deny the defendants the expressive use of the flag because their use will not promote the flag's symbolic value. It denies their expression because the ideas they wish to convey are offensive to the role of the flag as a symbol. The Supreme Court has held in *Street v. New York*, 394 U.S. 576, 592 (1969), that a state may not prohibit a person from

expresing verbally her opinions about the flag merely because they may shock the sensibilities of those who hear them. "Expressing contempt for the flag by burning it [may be] more emotionally shocking than speaking contemptuous words",[10] but both are shielded by the First Amendment.

III. Conclusion

As so many of its predecessors who have grappled with this issue, the Court feels unable to conclude without reflecting upon the gravity of its decision.

The First Amendment protects the expression of some repugnant viewpoints. Uniformed Nazis displaying swastikas are allowed to march in towns where Holocaust survivors dwell. *Collins v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). Ku Klux Klan members can burn crosses while expressing their racial and religious bigotry. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). To many perhaps, there are no more offensive viewpoints than those expressed by the burning of the American flag. The Court is acutely aware that those who burn our flag mock and trivialize this solemn symbol of our Nation's soul. Yet, "[i]t is poignant but fundamental that the flag protects those who hold it in contempt." *Johnson*, 109 S.Ct. 2533, 2548 (Kennedy, J. concurring).

Justice Jackson foreshadowed the outcome of this case when he wrote in *Virginia Board of Education v. Barnette*, 319 U.S. at 642, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its

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[10] Bogdan, *Congressional Prohibition of Contemptuous Flag Burning Suppresses Constitutionally Protected Free Speech*, 40 Wash. & Lee L. Rev. 1541, 1551 (1983).

substance is the right to differ as to things that touch the heart of the existing order."

The right to dissent is sometimes an albatross which burdens our society with its offensive sounds. Yet, political dissent lies at the heart of the First Amendment's protection. It is worth bearing in mind that the First Amendment to the Bill of Rights would not have been needed if the persons who exercise their right of free expression by word and action were all pleasing, loveable persons with whom the rest of the citizens agreed. The First Amendment, of course, makes no invidious exceptions. It provides protection for everyone, including the defendants.

The law under which these three defendants have been prosecuted is unconstitutional. Accordingly, the cases against them are dismissed with prejudice. An appropriate order is attached.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421

UNITED STATES OF AMERICA

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
SCOTT W. TYLER

[Filed: Mar. 5, 1990]

ORDER

Upon consideration of defendants' Motion to Dismiss the Informations Filed Against Shawn Eichman, David Blalock and Scott Tyler; the papers submitted in support of and in opposition to the motion; the oral arguments of counsel; the entire record herein; and for the reasons set forth in the accompanying opinion, it is by the Court this 5th day of March 1990,

ORDERED that the defendants' motion to dismiss is granted.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 89-0419, -0420, -0421 (JLG)

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHAWN D. EICHMAN, DAVID GERALD BLALOCK,
AND SCOTT W. TYLER, DEFENDANTS

[Filed: Mar. 6, 1990]

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the orders of this Court entered on March 5, 1990, dismissing the criminal informations filed in the above-captioned matter.

This appeal is taken under Pub. L. No. 101-131, § 3, 103 Stat. 777 (1989) (to be codified at 18 U.S.C. 700(d)).

DATED this 6th day of March, 1990.

Respectfully submitted,

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OPPOSITION

BRIEF

No. 89-1433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN E. EICHMAN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM OF APPELLEES IN RESPONSE TO JURISDICTIONAL STATEMENTS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM OF APPELLEES IN RESPONSE TO JURISDICTIONAL STATEMENTS

I. INTRODUCTION

On March 13, 1990, the Solicitor General, on behalf of the United States, filed jurisdictional statements appealing from the decision and order of the United States District Court for the District of Washington of February 21, 1990 in United States v. Haggerty, and from the decision and order of the United States District Court for the District of Columbia of March 5, 1990 in United States v. Eichman. Appellees, defendants below, agree that this Court has jurisdiction over these appeals and that the questions presented are substantial. Although these cases could be summarily affirmed in light of this Court's decision last term in Texas v. Johnson, 109 S. Ct. 2533 (1989), appellees agree that the Court should grant plenary review.

II. STATEMENT OF THE CASE

These are the only two cases nationwide that the United States has prosecuted in the five months that the Flag Protection Act of 1989 (Act), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700), has been in effect. The Act provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." 18 U.S.C. §700(a)(1). An exception follows, providing that the law "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. §700(a)(2). The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."

18 U.S.C. §700(b).

These cases arise out of political demonstrations that took place in, respectively, Seattle, Washington and Washington, D.C., in the days immediately following the Act's becoming law. In both cases, defendants admitted that they burned United States flags, and moved to dismiss the charges on the grounds that the Flag Protection Act is unconstitutional as applied to their politically expressive conduct and on its face.[1]

Appellees maintained below, and both district courts agreed, that dismissal is compelled by this Court's ruling last term in Texas v. Johnson. In Johnson, this Court held that while the government has an

[1]The government alleges that the flag burned in the Seattle demonstration at issue in United States v. Haggerty was a flag owned by the United States Postal Service. The flags burned in the incident that led to United States v. Eichman were indisputably appellees' own property.

interest in the flag's symbolic value, that interest is not sufficiently compelling to justify "criminally punish[ing] a person for burning a flag as a means of political protest." 109 S. Ct. at 2547. The government's interest in the flag permits it to persuade and encourage people to respect the flag, but does not permit it to compel the appearance of respect under penalty of imprisonment. Id.

Both district courts followed Johnson and ruled that the Flag Protection Act was unconstitutional as applied to appellees' politically expressive flagburnings. Each court first determined that appellees' conduct was sufficiently expressive to raise First Amendment concerns, a point no party disputed. Haggerty J.S. App. 5a; Eichman J.S. App. 9a-10a. Each court then concluded, as did this Court in Johnson, that because the government's interest in

protecting the flag is to preserve its symbolic value, and because that value can be impaired, if at all, only to the extent that conduct expresses disrespect for the flag, the governmental interest is necessarily "related to the suppression of free expression." Haggerty J.S. App. 10a; Eichman J.S. App. 11a; Johnson, 109 S. Ct. at 2542. Accordingly, the more lenient standard of First Amendment review articulated in United States v. O'Brien, 391 U.S. 367 (1968), is inapplicable, and the government must advance a compelling state interest.

The only interest Congress identified in enacting the Flag Protection Act was to preserve the flag's symbolic value, and in the district court proceedings the Government and counsel for the Senate and House Majority Leadership conceded that this was Congress's interest. But as both

district courts noted, that is the precise interest this Court found insufficient in Johnson. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 14a-15a; Johnson, 109 S. Ct. at 2547.

In its amicus brief, counsel for the House Majority Leadership also articulated an interest in the flag as an "incident of sovereignty," but both courts found that interest analytically indistinguishable from the interest in the flag's symbolic value. Haggerty J.S. App. 12a-13a; Eichman J.S. App. 15a-16a. Therefore, both courts correctly concluded that the asserted governmental interests did not justify criminally punishing respondents for their politically-motivated flagburnings. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 15a-17a.

Appellees also maintain that the Act is unconstitutional on its face, because it is

impermissibly content-based, overbroad, and vague.[2] It is content-based because it singles out for protection one symbol, with a particular content, among all symbols. It is therefore analytically indistinguishable from a statute prohibiting burning of the Democratic Party flag or copies of The Federalist Papers. Moreover, the Act prohibits only those forms of flag conduct which have historically been viewed as expressing protest or dissent.

In addition, several of the Act's specific terms are content-based. "Physically defile" was added to the statute expressly to reach acts that do no permanent

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[2]Neither district court expressly reached appellees' facial claim, although each determined that the Flag Protection Act was indeed content-based, (Haggerty J.S. App. 13a-14a; Eichman J.S. App. 9a-10a), and not justified by a compelling government interest. Therefore, both courts implicitly found the Act facially unconstitutional as well. Appellees will continue to press their "as applied" and facial claims in this Court.

physical harm to the flag, but nonetheless "injure the flag as a symbol of the United States" and "which most definitely do[] give offense." 135 Cong. Rec. S12616 (daily ed. Oct. 4, 1989). The clause that prohibits maintaining the flag on the floor or ground was added, not because such conduct was deemed to harm the flag's physical integrity, but in direct response to appellee Scott Tyler's flag exhibit at the School of the Art Institute of Chicago in March of last year. See 135 Cong. Rec. S2811 (daily ed. March 16, 1989). And the Act creates an exception for those who burn "worn or soiled" flags, added because Congress did not want to "'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day." H.R. Rep. No. 231, 101st

Cong., 1st Sess. 9 (Sept. 7, 1989).[3]

III. WHILE SUMMARY AFFIRMANCE MIGHT BE APPROPRIATE, APPELLEES BELIEVE THAT THE CASES SHOULD BE SET FOR PLENARY HEARING

The United States effectively concedes that Johnson controls these cases. It admits that the unprecedented theory it advances for upholding the Act -- that flagburning should be deemed unprotected activity in the first instance -- is "in tension" with Johnson, something of an understatement. Haggerty J.S. 27; Eichman J.S. 25. And it asks the Court to "reconsider" an argument -- that the availability of other means of protest

[3]The Act is overbroad because it forbids a multitude of expressive acts that do no harm to the flag's symbolic value or physical integrity, and in its definition of "flag of the United States." It is vague because it gives no guidance for determining when a flag is sufficiently "soiled or worn" to permit its destruction, nor for determining when a flag is "in a form commonly displayed."

should justify criminalizing this one -- which the Court flatly rejected in both Johnson, 109 S. Ct. at 2546 n.11, and Spence v. Washington, 418 U.S. 405, 411 n.4 (1974). Haggerty J.S. 23 n.16; Eichman J.S. 22 n.15. In Congress, the Administration testified repeatedly and forcefully that "[i]n the face of the Court's holdings in Texas v. Johnson and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 183 (1989) ("House Hearings") (Written Testimony of Assistant Attorney General William Barr,

Office of Legal Counsel).

In light of this Court's clear pronouncement less than one year ago in Johnson, and the two well-reasoned decisions below, appellees agree with Mr. Barr "it cannot be seriously maintained" that the Flag Protection Act is constitutional. This appeal might therefore be suitable for summary affirmance, and such a resolution would not be inconsistent with the literal terms of the statutory mandate that the Court take the appeal. However, appellees believe that the spirit of Congress's statutory directive, the constitutional implications of this case, and the strong public interest in the issues, weigh in favor of plenary hearing.

Should the Court choose the latter course, it should do so in a manner that will permit the issues to be briefed fully and carefully. As appellees have noted

previously, the schedule proposed by the Government, which would require submission of simultaneous briefs approximately two weeks after the Court decides to take the cases, replies one week later, and argument two days thereafter, gravely infringes upon appellees' due process rights, and is certainly not designed to provide for careful briefing of the issues.

Congress considered the legal questions posed by Johnson as applied to a federal flag statute sufficiently complex and important to require extended hearings over the course of several months.[4] The records of those hearings alone amount to 1,326 pages, and include testimony from three ex-Solicitors General, a sitting United States

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[4]Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) ("Senate Hearings"); House Hearings, supra.

judge, and seventeen law professors, offering various analyses and advice. All three past Solicitors General -- Charles Fried, Robert Bork, and Erwin Griswold -- agreed that any statutory enactment to protect the flag would be unconstitutional.[5] Several professors disagreed, including Professor Laurence Tribe of Harvard Law School, who argued that a statute designed affirmatively to protect the flag as a symbol would withstand constitutional scrutiny.[6] And as noted above, Assistant Attorney General Barr argued on behalf of the Administration that any flag statute would be unconstitutional.[7]

In view of Congress's determination that

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[5]Senate Hearings at 99 (Bork); id. at 248 (Griswold); House Hearings at 219 (Fried); id. at 199 (Bork).

[6]Senate Hearings at 99-124; House Hearings at 140-80.

[7]Senate Hearings at 64-139; House Hearings at 166-99.

the constitutional questions deserved careful and lengthy consideration before amending the flag statute, this Court should similarly allow sufficient time for a full and adequate airing of the legal issues before deciding the constitutional validity of the Act.

In the district court, the statute's defenders included the United States Attorney, the Senate, and the House Majority Leadership, all of whom offered differing analyses for upholding the statute. See Haggerty J.S. App. 4a ("While all three briefs argue that the Flag Protection Act is distinguishable from the law reviewed in Johnson and thus constitutional, they reach that end by differing and even conflicting means.") The United States has hinted in its Jurisdictional Statements that its theory in the Supreme Court will be different from that advanced in the lower

courts. In addition, several amici are likely to support the statute, and may offer still different analyses. To require appellees to file simultaneous opening briefs without even seeing the briefs of appellant and its supporters, and to respond to all of these varying positions in one week, would not be consistent with the importance Congress itself placed on this issue.

As noted previously, moreover, to expedite briefing to the extent suggested by the United States would denigrate appellees' due process right to brief the Court on a matter whose outcome could determine whether they will be incarcerated for up to one year. We trust that the importance of this issue is not lost on any of the parties or amici before the Court. That importance is disserved by such a truncated briefing and argument schedule as the Government has

proposed.[8]

V. CONCLUSION

While the Court could summarily affirm this case, appellees believe that probable jurisdiction should be noted and the case set down for a full hearing, with a briefing and argument schedule that permits the matters to be briefed with the care and consideration that they deserve.

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[8]Should the Court elect to set the cases for plenary hearing, appellees believe that it would be appropriate to consolidate argument in the cases, provided that counsel for appellees are allowed to divide their portion of the argument equally. Appellees in the two cases have had and are likely to continue to have divergent interests, but counsel believe that those interests can be represented fully if William Kunstler represents the appellees in United States v. Eichman and David Cole represents the appellees in United States v. Haggerty, each sharing half of the argument time in a single argument. This would serve judicial economy while ensuring that appellees' interests are adequately represented.

Respectfully submitted,

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